(4)

Supreme Court, U.S.
FILED
JUL 23 2001
CLERK

No. 00-1903

In The

Supreme Court of the United States

ROGER AND VIRGINIA GALLAND,

Petitioners,

v.

CITY OF CLOVIS, CLOVIS CITY COUNCIL and CLOVIS MOBILE HOME RENT COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of California

BRIEF, AMICUS CURIAE, OF ACTION APARTMENT ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF ROSARIO PERRY
ROSARIO PERRY, State Bar #55061
Counsel of Record
312 Pico Boulevard
Santa Monica, CA 90405-1108
(310) 394-9831

Counsel for ACTION Apartment Association
2812 Santa Monica Blvd., Suite 203
Santa Monica, CA 90404
(310) 828-7628

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Must a rental property owner prove that the governmental agency "deliberately flouts the law" to recover damages under 42 U.S.C. § 1983, even if the owner proves that the governmental agency unreasonably delayed an administrative hearing to obtain constitutionally mandated rent increases?

Is the California Supreme Court's standard of "deliberately flouting the law" too burdensome a standard to impose on the property owner's right to recover damages under 42 U.S.C. § 1983, when the owner has proven to the trial court that the administrative agency has unreasonably delayed in granting constitutionally mandated rent increases?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

BRIEF, AMICUS CURIAE, OF ACTION APARTMENT ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 1

IDENTITY AND INTEREST OF AMICUS CURIAE ... 1

THE CALIFORNIA SUPREME COURT'S RESTRICTION OF DUE PROCESS RECOVERY UNDER 42 U.S.C. § 1983 TO CASES WHERE PROPERTY OWNERS PROVE THAT THE GOVERNMENT "DELIBERATELY FLOUTS THE LAW" IS IN CONFLICT WITH THE GOVERNMENT'S CONSTITUTIONAL DUTY TO END CONFISCATORY PRICES WITHOUT UNREASONABLE DELAY..... 4

THE ONEROUS REQUIREMENTS IMPOSED BY THE CITY OF CLOVIS VIOLATED THE PROPERTY OWNERS RIGHT TO A RPOMPT DECISION AND WERE NOT MERELY THE RESULT OF "BUREAUCRATIC BUNGLING."..... 8

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Birkenfeld v. City of Berkeley, 17 Cal.3d 129, 130 Cal.Rptr. 465 (1976) 4, 5, 7, 9

Carson Mobilehome Owners v. City of Carson, 39 Cal.3d 194, 197 Cal.Rptr. 284 at 289 (1983) 5, 6, 9

Edwards v. Steele, 25 Cal.3d 406, 158 Cal.Rptr. 662 (1979) 2

Fisher v. City of Berkeley, 37 Cal.3d 644, 209 Cal.Rptr. 682 (1984) 6, 9

Galland v. City of Clovis, 24 Cal.4th 1003 at 1037, 103 Cal.Rptr. 71 (2001) 3, 7, 8, 9, 11, 12

Smith v. Illinois Bell Tel. Co., 270 U.S. 587, 70 L.Ed. 747, 46 S.Ct. 408 (1926) 5

STATUTES

42 U.S.C. § 1983 ..... 3, 4, 12

Santa Monica Rent Control Law Section 1805(d)(12) 2

BRIEF, AMICUS CURIAE, OF ACTION APARTMENT ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2 of the Rules of This Court, amicus curiae, ACTION Apartment Association, Inc. (hereinafter ACTION) submits this brief in support of the Petition for Writ of Certiorari.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

ACTION was originally formed as an unincorporated association in 1979 and has been a nonprofit corporation, organized under the laws of the State of California since 1984. ACTION is an acronym for "A Commitment To Insure Owner's Needs" and it currently represents the interests of approximately 3,200 Santa Monica rental property owners, who are mainly owners of Santa Monica apartment buildings.

ACTION members have been subject to the Santa Monica Rent Control Law since April 10, 1979 and have collectively filed hundreds of individual rent increase petitions between 1979 and 1998 when that process became too onerous. As a result of this collective experience, ACTION members found that the rent increase

---

[1] The parties have consented to the filing of this brief.

No counsel for any party authored this amicus brief in whole or in part, and no entity or person, other than amicus curiae herein (Action), its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

process in Santa Monica became so burdensome and time consuming that they consider it to be a useless act. As a result, few rent increase petitions are filed today. ACTION members know that although rent control boards should inevitably become more efficient after processing hundreds of rent increase petitions, the opposite is true insofar as the Santa Monica Rent Control Board is concerned.

During the first ten years that the Rent Control Law was in effect, the Santa Monica Rent Control Board usually complied with the 120-day time limitation found at Santa Monica Rent Control Law Section 1805(d)(12) by rendering timely decisions that took no more than two or three days of hearings. But once the Board discovered that the 120-day time limitation is meaningless because there is no remedy when the Board renders untimely decisions, it increased the procedural burdens in rent increase hearings to a point where few owners could complete the process without expensive professional assistance. Whenever its burdensome rent increase process or untimely decisions are challenged, the Rent Control Board most often responds with a citation to the California Supreme Court case of *Edwards v. Steele*, 25 Cal.3d 406, 158 Cal.Rptr. 662 (1979), which holds that time limitations placed upon administrative agencies are "directory procedural requirements" rather than "mandatory" or "jurisdictional." Thus, the Board retains jurisdiction to adjust rent levels no matter how long it takes to do so. The result of this situation is foreseeable for an agency that exists solely for the purpose of keeping rent levels as low as possible for as long as possible; the burdensome procedural requirements were increased to a point where

most rental property owners gave up filing rent increase petitions.

Court of Appeal published its Opinion in the case of *Galland v. City of Clovis* on June 9, 1999. ACTION members hoped that the decision would cause the Santa Monica Rent Control Board to become more efficient and reasonable when applying its rent increase process. But unfortunately, the California Supreme Court overruled the Court of Appeal's decision in *Galland v. City of Clovis*, 24 Cal.4th 1003, 103 Cal.Rptr. 71 (2001) and it did so in a manner which virtually assures that rental property owners subject to California rent control laws will continue to have no enforceable right to reasonable and expeditious rent adjustment procedures. This is a result of the California Supreme Court requiring that a 42 U.S.C. § 1983 claim can only be granted if the rental property owners prove: (1) the costs imposed are part of a government effort to deliberately flout established law, e.g., deliberately obstruct legitimate rent increases; or (2) the landlord suffers confiscation as a result of the imposition of such costs. See *Galland, supra,* 24 Cal.4th at 1037.

In the *Galland* decision, the California Supreme Court imposed a remedy for burdensome and expensive administrative procedures that required rental property owners to endure more of the same by going through more hearings to prove that the agency was "deliberately flouting" the law or that the result was "confiscatory," which was the entire point of going through the rent increase process the first time. In other words, in the *Galland* decision, the remedy is similar to the injury. The Decision also requires that before a rent control agency has to pay compensation for the injury it caused, the property owner

must first attempt to recover damages from the tenants in the form of higher rent increases.

For the reasons stated in this Brief, ACTION contends that the requirements imposed by the California Supreme Court in this case are not in accordance with requirements of federal law and must be reversed to end the violation of their rights.

THE CALIFORNIA SUPREME COURT'S RESTRICTION OF DUE PROCESS RECOVERY UNDER 42 U.S.C. § 1983 TO CASES WHERE PROPERTY OWNERS PROVE THAT THE GOVERNMENT "DELIBERATELY FLOUTS THE LAW" IS IN CONFLICT WITH THE GOVERNMENT'S CONSTITUTIONAL DUTY TO END CONFISCATORY PRICES WITHOUT UNREASONABLE DELAY.

Modern rent control laws were first applied in California during the 1970's, which was a time of high monetary inflation. The first law reviewed by the California Supreme Court was the Berkeley Rent Stabilization Ordinance which was first adopted in 1972. Although operating expenses and property taxes were increasing greatly at that time, the Berkeley rent control law froze all rent levels and did not permit any rent increases unless and until each individual property owner in that City petitioned the Rent Stabilization Commission for an individual rent increase. The California Supreme Court rejected this approach in *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 130 Cal.Rptr. 465 (1976):

> "For such rent ceilings of infinite duration an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for the previously mentioned situations in which the base rent cannot reasonably be deemed to reflect general market conditions. ***The mechanism is constitutionally necessary for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary. 'Property may be as effectively taken by long continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them. . . . '*** (*Smith v. Illinois Bell Tel. Co.*, (1926) 270 U.S. 587, 591, 70 L.Ed. 747, 749, 46 S.Ct. 408)" (Emphasis added) *Birkenfeld*, 17 C.3d 169.

The California Supreme Court struck down the first Berkeley rent control law because it found that rent levels could not be adjusted without unreasonable delay by using an individual rent adjustment process alone. However, in 1983, the California Supreme Court again reviewed increase procedures in *Carson Mobilehome Owners v. City of Carson*, 39 Cal.3d 194, 197 Cal.Rptr. 284 at 289 (1983) further defined the terms "long continued and unreasonable delay:"

> "The procedures of the Carson scheme are carefully tailored to meet the legitimate interests of the ordinance without a substantially greater incidence and degree of delay than is practically necessary." (See *Birkenfeld, supra*, ...) Under the ordinance, the Board has a maximum of 105 days to act on an application. If the Board has

> not acted within that time, the ordinance provides that an interim increase should be granted. *These provisions insure that a landlord will not suffer impermissibly confiscatory rents longer than is necessary for a relatively prompt determination of his or her application.*" (Emphasis added.) *Carson, supra,* 39 Cal.3d 193, 197 Cal.Rptr. 289.

Carson, supra, was a mixed blessing for mobilehome park owners in small California communities such as Clovis. On one hand, rent control agencies were required to render prompt decisions, while on the other hand, general rent adjustments were found to be unnecessary for those small communities. Therefore, the cost of participating repeatedly at rent adjustment procedures became a recurring business expense, which explains why the Gallands were subject to repeated rent increase proceedings in 1983, 1985, 1988, 1989 and 1990; there was no annual general rent adjustment.

In 1984, the Supreme Court again reviewed the Berkeley rent adjustment procedures in *Fisher v. City of Berkeley,* 37 Cal.3d 644, 209 Cal.Rptr. 682 (1984) where the Court approved a 120-day time limit, but seemed to express concern about any greater delays:

> " . . . We stress that only the facial validity of the ordinance is currently before the court. Whether individual landlords might prove a denial of due process because of delays exceeding the 120 day time limit is of great concern, but it is not before us at this time." (*Fisher, supra,* 37 Cal.3d, 682, Fn. 52.)

Despite the repeated references made for timely rent adjustment decisions by the California Supreme Court,

the Decision under review establishes that the matter is actually of little concern to the majority of that Court. The dissenting opinion of California Associate Supreme Court Justice Brown accurately sums up the majority's failure to address the constitutional requirements it first set forth in *Birkenfeld, supra.*

> "It is long settled that a rent control scheme is confiscatory and violates due process if it is not 'capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary.' (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 169 (*Birkenfeld*).) The majority rejects this standard, noting that *Birkenfeld* involved a facial challenge to a rent control scheme, whereas the Gallands are seeking 'damages resulting from . . . the rent-setting process itself.' (Maj. opn., ante, at p. 46.) But if a rent control scheme is unconstitutional on its face for failing to provide a streamlined rent adjustment procedure, then it is all the more unconstitutional when a concrete factual record establishes the scheme's inefficiency and inadequacy in practice. Surely, if Clovis had adopted regulations outlining all the convolutions of the rent adjustment procedure it imposed on the Gallands, including the unexplained delays and shifting demands for information, then those regulations would have been facially unconstitutional under *Birkenfeld*. The fact that Clovis kept its arcane procedures secret, even seeming to make them up as it went along, certainly does not militate a different conclusion in Clovis's favor." (*Galland, supra,* 23 Cal.4th 1043.

For the reasons so aptly stated by California Associate Supreme Court Justice Brown, although the California Supreme Court correctly states the Constitutional requirements during review of rent control provisions for facial validity, it actually does nothing to enforce those requirements when confronted with an "as applied" challenge when an agency has actually injured a rental property owner. Instead, that Court adopted a new standard where unreasonable delay, gross negligence and/or complete disregard for the property owners' right to a prompt decision are ignored or are deemed to be insufficient to establish a violation of their rights under Federal law.

For the reasons stated, ACTION respectfully urges this Court to grant certiorari and correct the unreasonable and inconsistent standards applied by the California Supreme Court in the *Galland* decision.

THE ONEROUS REQUIREMENTS IMPOSED BY THE CITY OF CLOVIS VIOLATED THE PROPERTY OWNERS' RIGHT TO A PROMPT DECISION AND WERE NOT MERELY THE RESULT OF "BUREAUCRATIC BUNGLING."

In the *Galland* case, the California Court of Appeal found that the standard for supporting a substantive due process violation is to prove that the government action is, "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or welfare." That Court found that, as applied, the process was so burdensome that it bore no reasonable relation to the proper legislative purpose of eliminating excessive

rents and deprived the Gallands of a "fair return" on their property. However, the California Supreme Court disagreed and found that the years of onerous administrative procedures imposed upon the Gallands were not enough to establish a due process violation because the trial court did not require that the Gallands prove "deliberate flouting" of their rights and that the City's action was described as the result "bureaucratic bungling."

ACTION contends that the label of "bureaucratic bungling" is an incorrect description of the facts in the *Galland* case. That term might provide an excuse for slow agency decisions when a law first goes into effect, but the degree of "bungling" cannot logically increase as the agency gains expertise in applying the law over the years. A review of the *Galland* decision itself establishes that the delays were not the result of "bureaucratic bungling" but a complete disregard of the property owner's right to a prompt decision that got worse over time.

As noted in the California Supreme Court decision under review, the Clovis Rent Stabilization Ordinance was first adopted in 1978 and that the Gallands sought judicial review of rent increase procedures in 1983 and 1985. *Galland, supra,* 24 Cal.4th 1010-1011. Therefore, by the time the Gallands filed their rent increase petitions in 1988, 1989 and 1990 the Ordinance had been in effect for 10 to 12 years and had been defended in court on at least two occasions.

Under these circumstances, the City could not possibly have been unaware of the California Supreme Court Decisions in *Birkenfeld, Carson* and *Fisher, supra,* which were rendered in 1984 or earlier. However, the City's

response to the Gallands' rent increase proceedings was to conduct itself as though the Commission had never conducted a rent increase process before and as though it had all the time in the world to impose unreasonable requirements upon the Gallands.

The rent increase petition which was first heard by the Rent Review Commission on April 13, 1988 (i.e.,"the 1988 rent increase") did not result in a final decision until March 3, 1989. The Gallands ordered the administrative record on March 29, 1989 to seek review of that decision. (24 Cal.4th 1011-1014). Then the process slowed down much more.

The "1989 rent increase" was first scheduled for hearing on September 29, 1989 but no final decision was issued by the Clovis City Council until May 1992, which is a period of more than two and one-half years. (24 Cal.4th 1014-1015). Finally, a third rent increase hearing ("the 1990 rent increase") was first scheduled for hearing on May 18, 1990, but it was not decided until the May 1992 council meeting, along with the 1989 increase request. (24 Cal.4th 1016-1018).

The process might had taken longer to complete, however in May 1990 (while the three administrative proceedings were before the agency), the Gallands sought judicial relief. The trial court ordered that final written decisions be issued in all proceedings by October 1, 1991 and that the administrative record be lodged with the court by November 1, 1991. Again, the City was not impressed. As explained by the California Supreme Court, "Due to delays on Clovis's part, however, final commission decisions were not issued until June 1, 1992,

and the administrative record was not lodged with the trial court until June 30, 1993." *Galland, supra,* 24 Cal.4th 1016-1018. Therefore, there was a period of four years from the date the first hearing was scheduled to the date the administrative records were lodged with the trial court.

During the years of administrative proceedings before the commission, the Gallands were not only required to produce their financial data for the park at issue in the rent increase process, but also were required to provide 10 years of financial data for other parks, bring expert witnesses to the hearing to establish a "fair return" rent adjustment process and a "fair rate of return." These unreasonable burdens are far beyond the capability of most rental property owners and it is nothing short of amazing that the Gallands complied with demands which were politely described by the California Supreme Court majority as, "inefficient" "bungling","shifting," "costly," "ad hoc", "ill considered" and "unjustified." (24 Cal.4th 1036-1037). Yet the California Supreme Court was not convinced that these actions rose to the level that required the City to pay damages for the injury caused to the property owners. The California Supreme Court decision indicates that the property owners must submit to additional hearings and attempt to prove: (1) the costs imposed are part of a government effort to deliberately flout established law, e.g., deliberately obstruct legitimate rent increases; or (2) the landlord suffers confiscation as a result of the imposition of such costs. *Galland, supra,* 24 Cal.4th 1003 at 1037. Apparently the property owners are required to prove "confiscation" a second time at these additional hearings even

though they already were required to prove that they were entitled to a "fair return" at the first hearings which began approximately twelve years ago. To add to the degree of difficulty, the California Supreme Court consistently refuses to define when "confiscation" occurs or how property owners can prove that it has occurred. It appears to mean that the property owners must be driven out of business so that a "Kavanau adjustment" cannot possibly do them any good before the City is required to pay them for their injuries:

> "It is conceivable there might be a case when it is clear that resort to a Kavanau adjustment will not prevent a constitutional injury from occurring. For example, there may be an instance when, despite a landlord's reasonable efforts, confiscatory rent regulations sustained over a long period of time have caused the enterprise to fail. Under such circumstances, a section 1983 damages remedy may well be available. But nothing of that sort is evident in the record of the present case." (*Galland*, 24 Cal.4th, 1029-1030).

ACTION contends that since the California Supreme Court majority sees no confiscatory result or section 1983 violation in the *Galland* case, it is doubtful that there will ever be a case where it finds a confiscatory result or violation of law under any circumstances.

Therefore, ACTION respectfully urges this Court to grant certiorari to determine whether or not the onerous procedural requirements imposed by the City of Clovis

were in violation of the property owners' rights or merely the result of harmless "bureaucratic bungling."

CONCLUSION

ACTION believes that this Court must review the important issues raised by this case because a failure to do so sends another strong message to California rent control agencies that there are no consequences for depriving property owners of their rights and because the California Supreme Court is unlikely to ever review a case where it finds that rent control regulations go so far to constitute a taking of private property, a denial of due process, or a violation of Federal Law and order compensation for the injury suffered.

Respectfully submitted,

ROSARIO PERRY, ESQ.
Counsel for Amicus Curiae